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In the Supreme Court of the United States

OCTOBER TERM, 1985

KENNETH W. BEHREND AND
BEHREND, ARONSON AND MORROW, PETITIONERS

v.

ALTON GODWIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners challenge the dismissal of their appeal on res judicata grounds.

1. Petitioners are an attorney and his law firm who were retained by respondents Alton and Karen Godwin[1] to bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, in connection with a severe injury sustained by Mr. Godwin during surgery in a Veterans Administration (VA) hospital.[2] Against petitioners' advice, the Godwins agreed to a settlement that provided them with a cash payment of $1,125,000 and Mr. Godwin with lifetime medical care at a VA hospital. Pet. App. 3a-4a.[3] Petitioners' fee for

[1] Mr. Godwin is now deceased (Pet. App. 3a).

[2] The action originally was brought in state court. It subsequently was removed to the United States District Court for the Western District of Pennsylvania pursuant to 38 U.S.C. 4116.

[3] The district court found that petitioners' conduct "permits the conclusion that counsel opposed the settlement of the case, not because the offer was unreasonable, but because a large fee was in jeopardy if plaintiffs accepted the offer" (Pet. App. 80a).

their services in obtaining this settlement was limited by statute to 25% of the settlement value. 28 U.S.C. 2678; Pet. App. 4a-5a. Instead of seeking 25% of the cash payment ($281,250), however, petitioners calculated the value of Mr. Godwin's future medical care, added that amount to the cash payment of $1,125,000, and concluded that the total value of the settlement was $2,091,000; they then requested 25% of that sum, or $582,750, as their fee (*id.* at 4a).

Despite petitioners' request, the district court found it appropriate to award a fee of $281,250 based only on the cash value of the settlement.[4] On petitioners' motion for reconsideration, the court reaffirmed its original fee award. Pet. App. 63a-86a. The district court also declined to award costs or expenses to petitioners because they had no contract for reimbursement with the Godwins (*id.* at 84a-85a).[5] And the court, expressing concern about "the intentions of counsel following the settlement" (*id.* at 86a), directed petitioners to refrain from pressing any claim in any court against the Godwins for an additional fee or for reimbursement for the costs of the litigation (*id.* at 4a-5a, 86a).[6]

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[4] The district court explained that this sum was "generous in view of the caliber of representation in this case" (Pet. App. 82a), explaining that "many of the substantive legal concepts, and most of the rules of procedure, seemed beyond the grasp of counsel" (*id.* at 83a). Indeed, the district court stated that "[i]f this was a statutory fee case, we would reduce the lodestar" (*ibid.*).

[5] Alternatively, the district court found that the denial of petitioners' request for fees and costs was an appropriate sanction for their "overreaching and unprofessional conduct" (Pet. App. 85a).

[6] The district judge characterized petitioners' conduct during the course of their representation of the Godwins as the most "egregious example of overreaching by a lawyer" that he had encountered "in 10 years of public service and 22 years at the bar" (Pet. App. 70a).

On appeal, petitioners challenged the district court's ruling setting their fee and denying them costs, although they did not challenge the order that they refrain from pursuing further claims against the Godwins (Pet. App. 5a). The court of appeals affirmed the district court's judgment (*id.* at 16a-62a). It ruled that petitioners were estopped from seeking a larger fee from the Godwins. The court of appeals also held that petitioners were not contractually entitled to recover costs or expenses from the Godwins and that, in any event, their claim for costs had not been preserved because they had failed to file a timely request for reimbursement. *Id.* at 56a-57a. This Court denied petitioners' subsequent petition for a writ of certiorari. No. 84-203 (Oct. 9, 1984).

2. After this Court's denial of certiorari, petitioners filed a motion in district court under Fed. R. Civ. P. 60(b), seeking relief from the court's order prohibiting them from asserting further claims against the Godwins. The motion was denied (Pet. App. 13a-15a).[7]

On petitioners' appeal, the court of appeals again affirmed the dismissal of their claim. The court noted that petitioners' prior appeal had not challenged the order prohibiting them from seeking costs and expenses from the Godwins (Pet. App. 7a, 8a), and held that petitioners "may not now challenge the procedure followed by the district court or the basis for its decision on any grounds that [they] could have, but did not, raise previously" (*id.* at 9a). The court of appeals also explained that its prior deci-

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[7] As the court below noted (Pet. App. 8a), petitioner Behrend also filed individual damages actions arising out of this litigation against the district judge and the Assistant United States Attorney who originally handled the case. *Behrend* v. *Ziegler*, No. 85-17 (W.D. Pa.), appeal pending, No. 85-3495 (3d Cir.); *Behrend* v. *McKay*, No. 85-16 (W.D. Pa.), appeal pending, No. 85-3494 (3d Cir.). These actions were dismissed on immunity grounds by the district court and currently are pending on appeal.

sion had held on the merits that petitioners had failed to preserve their claim against the Godwins for costs or expenses (*id.* at 7a, 10a), so that their "claims for reimbursement from the Godwins have already been litigated before the district court and this court" (*id.* at 10a).

The court of appeals accordingly concluded that "[t]he doctrine of *res judicata* bars further litigation of these same claims" (Pet. App. 10a-11a). In these circumstances, the court of appeals held that the All Writs Act, 28 U.S.C. 1651(a), authorized the district court to prohibit the initiation of meritless suits presenting claims for costs or expenses identical to those that already had been rejected (Pet. App. 6a-7a). Because it found petitioners' claims on appeal entirely frivolous, the court of appeals, citing Fed. R. App. P. 38 and 28 U.S.C. 1912, also ordered petitioners to pay double costs (Pet. App. 11a).

3. Petitioners' claim that they were denied due process when the district court rejected their Rule 60(b) motion without holding a hearing (Pet. 13) is patently frivolous. Both courts below found it obvious that petitioners' attempt to relitigate a claim against their erstwhile clients was barred as a matter of law by res judicata. In these circumstances, the district court was under no obligation to hold a hearing prior to denying petitioners' motion on the papers.

Indeed, petitioners' claim that a due process issue is presented here because they were "fine[d]" (Pet. 14) or "sanction[ed]" (Pet. 15) without advance notice mischaracterizes the course of the proceedings below. The court of appeals' original decision affirming the denial of costs expressly declined to treat the district court's order as a sanction (Pet. App. 54a); instead, it held that petitioners were not contractually entitled to reimbursement and had not, in any event, preserved any claim for costs (*id.* at 56a-57a). Against this background, the district court's order barring further actions against the Godwins for costs or expenses

simply prevented petitioners from seeking a recovery to which they were not entitled on the merits, and served principally to protect the Godwins from petitioners' continuing course of "overreaching and unprofessional conduct" (*id.* at 85a; see *id.* at 70a, 72a-73a, 80a-82a, 85a-86a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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